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WILMER, CUTLER & PICKERING
2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

WILLIAM R. RICHARDSON, JR.
DIRECT LINE (202)
663-6038

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363

DOCKET NO. 92-266 ORIGINAL

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44 171) 839-4466
FACSIMILE 011 (44 171) 839-3537

RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (322) 231-0903
FACSIMILE 011 (322) 230-4322

FRIEDRICHSTRASSE 95
BRIEFKASTEN 29
D-10117 BERLIN
TELEPHONE 011 (49 30) 2643-3601
FACSIMILE 011 (49 30) 2643-3630

March 13, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

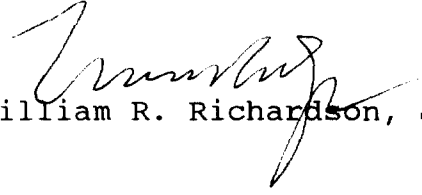
Re: MM Docket No. 92-266
Ex Parte Presentation

Dear Mr. Caton:

On March 12, 1996, the undersigned and Stephen P. Cunningham of ValueVision International, Inc. met with Lisa B. Smith, Suzanne Toller, and Mary P. McManus to discuss proposals for leased access request procedures summarized in the attached letter.

If there are any questions concerning the above-referenced matter, please communicate with the undersigned.

Sincerely yours,


William R. Richardson, Jr.

Encl.

cc: Lisa B. Smith
Suzanne Toller
Mary P. McManus

For the undersigned
DATE: 3/13/96

021

WILMER, CUTLER & PICKERING

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WASHINGTON, D.C. 20037-1420

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FACSIMILE (202) 663-6363

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March 12, 1996

BY HAND

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
MM Docket No. 92-266

Dear Mr. Caton:

On behalf of ValueVision International, Inc. ("ValueVision"), this letter sets forth some proposals for leased access request procedures that ValueVision believes are necessary and appropriate in order to avoid unnecessary further delays in making leased access a "genuine outlet" for unaffiliated programmers,^{1/} and to promote the kind of "certainty" about leased access requirements that Congress sought in the 1992 Cable Act.^{2/} These recommendations are based upon ValueVision's

^{1/} See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5631, 5937 & n.1264 (1993), quoting S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1992).

^{2/} See S. Rep. No. 92, supra, at 31-32:

" . . . to be successful, a programmer may well have to be carried on many cable systems and thus have to negotiate leased access rates with many operators. Because of the uncertainty caused by [the existing] provision, a programmer would almost certainly see this as a hopeless task.

" . . .

(continued...)

experience, as documented in its prior filings in this docket and others,^{3/} that cable operators have been very reluctant to honor leased access requests on a timely basis under the current rules.

1. As recent decisions make clear,^{4/} the Commission's rules now require leased access rates to be made available upon request, but do not provide a time limit for doing so. 47 C.F.R. § 76.970(e). As noted in ValueVision's prior filings,^{5/} almost 70 of the nation's largest 99 MSOs did not even acknowledge ValueVision's initial 1993 requests for leased access for months. To ensure prompt compliance, ValueVision urges that the operator be required to place its leased access rates in its public file and, as with political rate and all other information contained therein, provide copies thereof "within a reasonable period of time, which in no event shall be longer than seven days." Id. § 76.305(d). Since the operator already retains this information for Commission inspection, id. § 76.970(e), placing it in the public file subject to prompt copying at the applicant's expense involves no significant additional burden for the cable operator. Because leased access programmers (unlike political candidates, local broadcast stations, and subscribers) may often not be located nearby,^{6/} ValueVision also urges that the Commission permit leased access rate requests to be made by mail or telecopy.

2. ValueVision also believes that the Commission should ensure that the information provided is adequate to enable

^{2/}(...continued)

" . . . By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels."

^{3/} These experiences have also been described in ValueVision's reply comments in CS Docket Nos. 94-48 and 95-61, in connection with the Commission's annual assessments of the status of competition in the market for delivery of video programming.

^{4/} See, e.g., Karl Schroll, DA 96-286 (CSB Mar. 12, 1996) (dismissing petition alleging failure to provide leased access rates, because Comcast provided such rates two months after the filing of the petition).

^{5/} See, e.g., Supplement to Petition for Reconsideration at 2 (Nov. 23, 1993).

^{6/} See note 2 supra.

leased access applicants to assess the compliance of the quoted rates with the Commission's requirements. Thus, the operator's leased access rate calculations should be required to include an identification of those channels being used to calculate the rates, and a breakdown for each such channel of the current number of subscribers, the monthly local ad revenue it generates for the operator, and the monthly commissions or other fees it pays. As noted above, because these calculations would already be retained for Commission inspection, making such data available to leased access applicants would not amount to a significant burden.^{7/}

3. If the supply of leased access time exceeds demand, ValueVision urges that the operator be required to carry each applicant within 60 days of confirmation that the applicant is willing to pay the rates previously quoted. This period is at least as generous as that provided to arrange for carriage of must carry signals and permits the operator more than adequate time to notify subscribers of the change.^{8/}

4. The leased access programmer should be entitled, at its option, to obtain access at the specified rate for up to one year, at which time the process could begin anew (with carriage not discontinued in the interim). This procedure avoids the delays, disruption, and transaction costs to both parties from having to renew the process on a monthly basis. It would involve no financial risk to the cable operator, which may require monthly prepayment of the fee (with reasonable notice and opportunity to cure prior to cancellation for nonpayment, of the kind typically provided in traditional lease agreements).

5. ValueVision has urged the Commission to use the first-come-first-served policy that it adopted with the original leased access rules in 1992.^{9/} If the Commission is inclined

^{7/} We assume that the Commission would not dismiss a leased access complaint challenging the operator's calculations simply because the complaint was based on reliable industry data rebutting these figures (e.g., trade publication reports concerning ad availabilities and commission payments being offered by the displaced cable channels).

^{8/} Cf. Fouce Amusement Enterprises, Inc., 10 FCC Rcd 668 (CSB 1995) (ordering carriage within 30 days of release date of order); WTKK TV, Inc., 10 FCC Rcd 2732 (CSB 1995) (45 days); Cablevision Systems Corp., DA 95-2420 (CSB released Feb. 21, 1996) (60 days).

^{9/} Petition for Reconsideration at 13 (June 21, 1993).

instead to permit market negotiation when requests for leased access time exceed the designated supply, ValueVision urges that in such cases the seven-day response to a leased access request described above should include both (a) the leased access rate calculations, and (b) a certification that the number of unaffiliated applicants that have already requested carriage exceeds the required supply. This requirement will help to ensure the prompt sale of time at the regulated rate where leased access channels exceed demand at the time of the request.

6. Under any such market negotiation approach, the operator should be given a finite period to negotiate among the various applicants for the most remunerative carriage options. ValueVision believes that, at the outset, the number of prospective applicants for leased access will not be large, and that such relatively simple negotiations (e.g., lease term and channel position) can and should be implemented within one week. Competing programmers have no desire for delay, and the rules should provide no incentive for the operator to create it.

7. In any such market negotiation process, ValueVision believes that it would be prudent to establish a rebuttable presumption of carriage for those applicants agreeing to pay the highest rates. Consistent with this presumption, such an applicant should also have a right, in the event its request is rejected, to receive carriage on the terms offered by any selected applicant that has agreed to pay less. This procedure would ensure that the operator recovers its opportunity costs fairly, and it creates disincentives for the operator to manipulate the process by selecting a less remunerative channel for anticompetitive reasons. As Congress recognized in making the 1992 Act reforms, ". . . the operator may believe that the programmer might compete with programming that the programmer owns or controls."^{10/}

8. To permit monitoring by leased access programmers of the operator's compliance with these requirements, the Commission should require the operator promptly to notify those who are refused leased access as to the identities of those who are granted access, the monthly rates they have agreed to pay, and the duration of their leases. Such information is particularly important given the recognition by Congress that the operator may well have an incentive to deny access to competitors or to condition it on unreasonable rates.

9. ValueVision is also concerned about the incentive of cable operators to deny carriage to leased access competitors

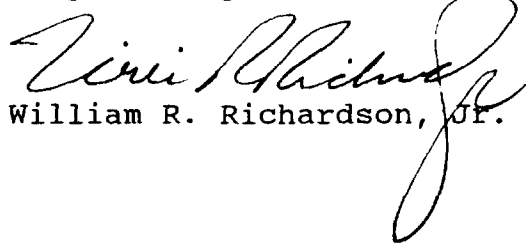
^{10/}

S. Rep. No. 92, supra, at 31.

by filling up their leased access capacity with programmers that may disappear within relatively short periods of time. If such programmers are later dropped from the system for nonpayment or any other reason, ValueVision urges that prior leased access applicants be given prompt notification and first opportunity to replace them. Of course, the Act also requires that the programmers selected for leased access must be unaffiliated with the operator, with certain limited exceptions. We would urge the Commission to enforce this requirement by reference to debt, equity, or managerial or other service relationships between leased access programmers and cable operators that could otherwise undermine this protection.^{11/}

Thank you for your consideration of these proposals.

Respectfully submitted,



William R. Richardson, Jr.

^{11/} Cf. Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606, 3649-53 (1995) (ongoing review of broadcast ownership attribution rules to include financial relationships).